87 1485

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARTHUR J. BLANCHARD

Petitioner

V.

**JAMES BERGERON,
SHERIFF CHARLES FUSELIER,
ABC INSURANCE COMPANY,
DEF INSURANCE COMPANY,
BARRY BREAUX, OUDREY GROS, JR.,
DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE,
GHI INSURANCE COMPANY**

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**WILLIAM W. ROSEN,
ATTORNEY AT LAW
820 O'Keefe Avenue
New Orleans, Louisiana 70113
Telephone: (504) 581-4892**

**ATTORNEY FOR PETITIONER
ARTHUR J. BLANCHARD**

QUESTIONS PRESENTED

After a successful civil rights trial under 42 U.S.C. §§ 1983 and 1988, compensatory and punitive damages were awarded to the Plaintiff, Arthur J. Blanchard. Counsel, under § 1988, made application for an attorney's fee with all supporting documents. The district court awarded a fee of SEVENTY-FIVE HUNDRED ($7,500.00) DOLLARS. Costs and expenses were awarded in the amount of $886.92. Counsel considered both amounts insufficient for the time and effort involved. As appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, by Judgment rendered November 10, 1987, lowered counsel's fee to $4,000.00 holding that there was a contingent fee agreement and the agreement served as a "cap" on the amount of attorney's fee recoverable. In adhering to that theory, the Court did not consider nor did it include as a part of the fee the time spent by and valuable services of paralegals and law clerks.

The questions presented, therefore, are:

1. Does an agreement between the client and his counsel serve as a "cap" to limit the award of attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. § 1988)?

2. Should the time of paralegals and law clerks be considered in the award of a reasonable attorney's fee under 42 U.S.C. § 1988?

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

The actual parties at interest in this proceeding are James Bergeron (former Deputy Sheriff), Sheriff Charles Fuselier, (Sheriff of St. Martin Parish, Louisiana), American Druggist Insurance Company (in Liquidation), and the Louisiana Insurance Guarantee Association. All interests are represented through one attorney, Mr. Edmond L. Guidry, III, Attorney at Law, Guidry & Guidry, 324 S. Main Street, St. Martinville, Louisiana 70582. There are no other parties at interest in the present proceeding despite their appearance in the original title.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

PAGE

CASES:

TABLE OF AUTHORITIES (Continued)

PAGE

CASES:

STATUTES:

TABLE OF AUTHORITIES (Continued)

IN THE

SUPREME COURT

UNITED STATES OF AMERICA

OCTOBER TERM, 1987

NO. _____

ARTHUR J. BLANCHARD

Petitioner

V.

JAMES BERGERON,
SHERIFF CHARLES FUSELIER,
ABC INSURANCE COMPANY,
DEF INSURANCE COMPANY,
BARRY BREAUX, OUDREY GROS, JR.,
DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE,
GHI INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Arthur J. Blanchard, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 831 F.2d 563 (5th Cir. 1987) and is reprinted in the Appendix at pages 1A - 5A.

There are two opinions from the United States District Court for the Western District of Louisiana. They are:

A. On Attorney's fees and costs: Judgment from the Monroe Division entered October 23, 1986 (Appendix pages 6A through 16A.)

B. The original Judgment on the jury verdict from the Lafayette Division entered May 30, 1986 (Appendix pages 17A through 18A).

JURISDICTION

The Judgment of the Court of Appeals, Fifth Circuit, was entered on November 10, 1987. The Supreme Court granted an extension of time to March 9, 1988, to file this Petition for Writ of Certiorari. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101 (c).

STATUTE INVOLVED

The original statutes under which this matter was brought before the United States District Court were 42 U.S.C. § 1983 and 1988.

This application for fees is brought under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (Appendix page 20A).

STATEMENT OF THE CASE

This Civil Rights case was originally filed in the United States District Court for the Western District of Louisiana (Lafayette Division) under 42 U.S.C. §§ 1983 and 1988. After a jury trial, it was found that the Plaintiff, ARTHUR J. BLANCHARD, had been assaulted without justification by Deputy Sheriff James Bergeron, a member of the Sheriff's Office of St. Martin Parish, Louisiana. The assault took place in Oudrey's Odyssey Lounge. The Lounge, its owners and insurer were joined under pendent jurisdiction. In the beating Mr. Blanchard suffered a broken jaw and other lesser injuries.

After entry of the Judgment on the verdict, counsel for Arthur Blanchard submitted detailed time, cost, and expense records to support his application for an attorney's fee and costs under 42 U.S.C. § 1988. Counsel's deposition was taken by opposing counsel. The fee application included substantial time of paralegals and law clerks. The original fee requested included time spent on the civil rights case and trial, and on the research, brief, deposition, etc., for the fee application. It totaled $36,780.00. Out-of-pocket costs and expenses amounted to $5,511.92. Of those amounts, the District Court awarded an attorney's fee of $7,500.00 plus costs and expenses in the amount of $886.92. Counsel appealed to the Court of Appeals for the Fifth Circuit.

As of the time of submission of the brief to the Fifth Circuit (but not including services or time for preparation for oral argument or presentation of the case) counsel increased the total fee requested to $42,699.30. Costs increased by $329.32 for a total of $5,841.24.

The Court of Appeals for the Fifth Circuit, by Judgment dated November 10, 1987, decreed that the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974) ". . . by which we are bound," required that a contingent fee contract ". . . serves as a cap on the amount of the attorney's fee to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee." *Blanchard v. Bergeron, et al*, 831 F.2d 563, 564 (5th Cir. 1987).

This Petition for Writ of Certiorari should be granted for the following reasons:

1. The decision of the Fifth Circuit is in conflict with the rulings of virtually every other United States Circuit. Supreme Court Rule 17.1(a).

2. The Fifth Circuit opinion appears to violate the directives of this Court's decision in *City of Riverside, et al. v. Santos Rivera*, _____ U.S. _____ , 106 S.Ct. 2686 (1986) on the issue of a contingent fee contract limiting an attorney's fee recovery under 42 U.S.C. § 1988. Supreme Court Rule 17.1(c)

3. *If* the *City of Riverside* case is not definitive on that issue, then each federal Court of Appeals has made a statement on this issue, but it has not been decided by the Supreme Court of the United States. An associated issue is whether or not the time of paralegals and law clerks should be included in a civil rights attorney's fee award. These are important questions of federal law in the civil rights area which have not been, but should be, settled by this Court. Supreme Court Rule 17.1(c)

4. The Fifth Circuit's opinion is factually and procedurally confusing in that it fails to state whether the fee, *if* limited by the contingent agreement, is to be paid from the damage award received by Mr. Blanchard or to be paid by the Defendant. The opinion also is confusing in that it is written in terms of not allowing a "windfall" to the appellant (the client) and disregards the issue of a reasonable fee to appellant's attorney.

ARGUMENT

Argument will be presented under four (4) categories:

I. *Blanchard* Conflicts With Rulings of The United States Supreme Court

II. *Blanchard* (Fifth Circuit) Conflicts With All Other Circuit Courts

III. *Blanchard* Failed To Include Paralegal And Law Clerk Time

IV. Factual And Procedural Confusion in *Blanchard*

1. *BLANCHARD* CONFLICTS WITH RULINGS OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit's decision in *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987) appears to conflict with the ruling of this Court in *City of Riverside, et al v. Rivera*, _____ U.S. _____ , 106 S.Ct. 2686 (1986). In that case, the Supreme Court Stated that:

> "We reject the proposition that fee awards under § 1988 should necessarily be propor-

tionate to the amount of damages a civil rights plaintiff actually recovers." Id. at 2694.

"A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988." Id. at 2695.

"A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the Courts. This is totally inconsistent with the Congress' purpose in enacting § 1988." Id. at 2695.

". . . [W]e find no evidence that Congress intended that, in order to avoid 'windfalls to attorneys,' attorney's fees be proportionate to the amount of damages a civil rights' plaintiff may recover." Id. at 2697.

"In the absence of any indication that Congress intended to adopt a strict rule that attorney's fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves." Id. at 2698.

Although this Court did not specifically use the word "contingent fee contract", it is difficult to understand how the Court of Appeals for the Fifth Circuit could have interpreted the language otherwise. *If* the Supreme Court language in *City of Riverside* is intended to apply to contingent fee agreements, the the Fifth Circuit's ruling is in direct conflict and should be reviewed by this Court. See also *Pennsylvania v. Delaware Valley Citizens' Council*, _____ U.S. _____, 107 S.Ct. 3078, 3085(B) (1987).

If this Court's *City of Riverside* decision is not intended to apply to contingent fee contracts, then Certiorari should be granted so that this Court may review the decisions of all Circuits and determine a consistent, national policy.

II. *BLANCHARD* (FIFTH CIRCUIT) CONFLICTS WITH ALL OTHER CIRCUITS

A Writ of Certiorari should be granted because the Fifth Circuit is in conflict with virtually every other Circuit of the United States. Every other Circuit now subscribes to the lodestar method of computing attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976. At a minimum, the lodestar approach is the beginning point. Many Circuits have subscribed to the 12 factors set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, supra at 717-719, but none adhere to a rigid standard that a contingent fee agreement sets an upper limit on recovery of civil rights attorney's fees. The Fifth Circuit in the *Blanchard* decision states that it was "bound" by *Johnson* to set the cap, apparently referring to dictum[1] in that 1974 case decided before the Civil Rights Attorney's Fee Award Act of 1976.

---

1. "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." *Johnson, supra* at 718. However: ". . . Judge Holoway noted that problems arise in applying the *Johnson* dictum. . . ." *Cooper v. Singer*, 719 F.2d 1496, 1500, note 6 (10th Cir. 1983) and "*Johnson* was a civil rights case decided before the enactment of the Civil Rights Attorney's Fee Award Act 42 U.S.C. § 1988 (1976), and thus is inapplicable." *Fleet Investment Co. Inc. v. Rogers*, 620 F.2d 792, 793, note 1 (10th Cir. 1980).

The Circuit opinions which are contrary to the holding of the Fifth Circuit *Blanchard* decision are:

The First Circuit: *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985); *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978) [". . . [W]e reiterate that a fee arrangement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee."] Id. at 649.

Second Circuit: *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986) ["Contingency is but one of twelve factors which the Supreme Court has said should be considered in fixing a reasonable attorney's fee" Id. at 575, citing *City of Riverside v. Rivera*, supra]; *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982).

Third Circuit: *Sullivan v. Crown Paperboard Co., Inc.*, 719 F.2d 667 (3d Cir. 1983) ["At its clearest, the legislative mandate would therefore have courts consider the existence of contingency arrangements, while not allowing such consideration to thwart the enforcement of the substantive statutory rights that gave rise to the fee award provision." Id. at 669]; *Durett v. Cohen*, 790 F.2d 360 (3d Cir. 1986).

Fourth Circuit: *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244 (4th Cir. 1985); *Harrington v. Empire Const. Co.*, 167 F.2d 389 (4th Cir. 1948).

Sixth Circuit: *United Slate Tile & Composition Roofers et al v. G. & M. Roofing and Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) ["The existence of a contingency contract may be considered by the District Court as an element to be considered in determining the market value of an attorney's services, but the Court is not bound in any sense by that agreement." Id. at 504]

Seventh Circuit: *Lenard v. Village of Melrose Park*, 699 F.2d 874 (7th Cir. 1983) ["The trial court may consider as a factor the contingent fee contract, but it is not to be an automatic limit on the attorney fee award." Id. at 899]; *Sanchez v. Sanchez*, 688 F.2d 503 (7th Cir. 1982).

Eighth Circuit: *Sisco v. J. S. Alberici Construction Co., Inc.*, 733 F.2d 55 (8th Cir. 1984) ["We hold that a percentage fixed in a contingent-fee contract is not an absolute ceiling on fee awards. We reverse and remand for a determination by the District Court of a proper fee award in this case." Id. at 56. "These effects [[limitation of fee to a contingent fee contract]] would run counter to the intention of Congress to encourage successful, civil-rights litigation" Id. at 57.]

Ninth Circuit: *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) [". . . Section 1988 authorizes the award of a reasonable fee not necessarily limited to the fee agreed upon by the parties." Id. at 1408.]

Tenth Circuit: *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) ["We therefore conclude that a section 1988 fee award should not be limited by a contingent fee agreement between the attorney and his client." Id. at 1503 (this is an excellent analysis of Section 1988 awards)]; *Fleet Investment Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980) [The limitation of fees in civil rights cases to a contingent fee contract ". . . would obviously frustrate the intent of Congress and we refuse to adopt such a rule." Id. at 793.]

Eleventh Circuit: The Fifth Circuit opinion in *Blanchard* cites the Eleventh Circuit case of *Pharr v. Housing Authority of City of Pritchard, Alabama*, 704 F.2d 1216 (11th Cir. *1983*) as support for its ruling that a contingent fee contract sets the upper limit in a § 1988 fee case. The Fifth Circuit

could have better examined *Tic-X-Press, Inc. v. Omni Promotions Company of Georgia*, 815 F.2d 1407 (11th Cir. *1987*) in which that argument was rejected with the Court saying, ". . . the District Court decided to determine a 'reasonable' fee by applying the twelve factors articulated in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), without regard to a contingency fee agreement. Accordingly, the Court analyzed TXP's fee request in light of the *Johnson* guidelines and calculated the plaintiff's lodestar at $118, 545.00 concluding that the hours expended and rates charged were reasonable." Id. at 1423 The Eleventh Circuit affirmed the District Court's award. See also *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. *1986*), in which paralegal time was added to attorney time and the contingent fee agreement was "enhanced" by 35%. See also *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985), cert. den. _____ U.S. _____ , 105 S.Ct. 3531 (1985) saying, "However, in assigning weight to other factors '[n]o one *Johnson* criterion should be stressed to the neglect of others' [citation omitted]. Although the amount involved is generally a factor to be considered, a fee award may not be limited to a 'modest proportion of the total monetary recovery' or even to 'the [total] amount recovered' " [citations omitted] Id. at 1569.

District of Columbia Circuit: *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984) cert. den. 472 U.S. 1021, 1055 S.Ct. 3488 [supporting lodestar, the Court said, "The fee award must be recalculated according to the market rates established by those firms in their everyday practice." Id. at 30. The Court does not state whether or not there was a contingency fee contract. It refused to approve a "contingency multiplier" and found no ground for a "contingency enhancer," both of which had been added to the lodestar calculation by the trial court.]; *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. en banc 1980) ["Contingency

adjustments . . . are entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation. . . . The Contingency adjustment is a percentage increase in the 'lodestar' to reflect the risk that no fee will be obtained" Id. at 893.]

The national policy question to be reviewed in the *Blanchard* case is broader than the *Blanchard* facts. It is respectfully suggested that if this Fifth Circuit opinion is allowed to stand, it may serve to deny attorneys in successful civil rights actions a fee in such varied situations as (1) where the attorney and client have a contingent fee agreement contract but the client becomes bankrupt, [all funds could be held by the trustee], or (2) where the client is or becomes incompetent and the validity of the contract is in question, or (3) if there were no prior fee agreement with the client. A clear, national interpretation will serve to encourage participation by competent counsel who can rely upon a Supreme Court decision to insure an award of a reasonable fee in these highly contested civil rights matters. It will enhance the intent of Congress in all of the civil rights statutes.

III. *BLANCHARD* FAILED TO INCLUDE PARALEGAL AND LAW CLERK TIME

The *Blanchard* decision failed to account for the many hours of work performed by counsel's paralegals and law clerks to whom various tasks were assigned (at a substantially reduced rate calculation) and whose work provided excellent results to counsel and to the client. The *Blanchard* court stated, "Moreover, any hours 'billed' by law clerks and paralegals would also naturally be included within the contingent fee." *Blanchard* supra at 432.

The Supreme Court of the United States has approved compensation for law clerks in a similar case when it affirmed 84.5 hours of law clerk time at $25.00 per hour as part of a $245,456.25 fee. See *City of Riverside*, supra at 2687 and 2698. The Fourth Circuit, in affirming a fee of $372,942.00, approved $40.00 to $60.00 per hour for law clerks and $35.00 to $50.00 per hour for paralegals. *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244, 1245 (4th Cir. 1985). The Sixth Circuit included paralegals in a § 1988 award in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979). In 1983, the Tenth Circuit said, "We recognize the increasing widespread custom of separately billing for the services of paralegals and law students who serve as clerks." *Ramos v. Lamm*, 713 F.2d 546 at 558 (10th Cir. 1983). The Eleventh Circuit included, as attorney fees, paralegal time at $30.00 per hour. *Walters v. City of Atlanta*, supra at 1151.

The United States Supreme Court has not specifically ruled upon the validity of the use of paralegals and law clerks in today's legal market. The indications, however, are clear that this Court and many Circuits recognize the utility of using of paraprofessionals in saving time to the supervising attorney and saving money to the client. It is respectfully suggested that it is time for specific recognition of these facts by the Supreme Court of the United States. The time of paralegals and law clerks should be considered part of and included in the calculation of total service for which an attorney's fee is due.

IV. FACTUAL AND PROCEDURAL CONFUSION IN *BLANCHARD*

In addition to the Fifth Circuit's failure in *Blanchard* to follow a prior decision of the United States Supreme Court and disregarding *Blanchard's* conflict with every other

Circuit, the opinion is factually and procedurally confusing. Does the opinion mean that Arthur Blanchard must pay the $4,000.00 fee out of his own damage recovery, or does it mean that the Defendants pay the $4,000.00 fee? The decision is silent. If it is the latter, clearly the fee is not the classic contingent fee since, in that situation, an attorney accepts as a fee part of that which his *client* recovers. If it is the former, then the decision is violative of the intent of Congress and operates to the benefit of those who have violated civil rights and to the detriment of the victim. *City of Riverside*, supra at 2694, 2697, 2698. See also *Cooper v. Singer*, supra.

The Fifth Circuit decision in *Blanchard* also is confusing in the Court's statement that, "[T]he reason enunciated for this limit [the contingent cap allegedly required by *Johnson*] is that an appellant will not be given a windfall via § 1988." It is not the client who receives the attorney's fee as suggested by the Fifth Circuit, but it is the attorney who receives the fee. And the attorney does not receive a "windfall" if his fee is properly awarded under *Johnson* and lodestar standards are *correctly applied*. *Blum v. Stenson*, _____ U.S. _____, 104 S.Ct. 1541, 1546 (1984).

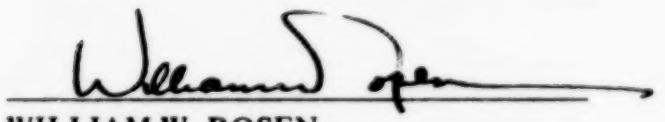
CONCLUSION

The Fifth Circuit's ruling in this case conflicts with all other Circuits. S.Ct. Rule 17.1(a). Whether or not there should be any "cap" upon a properly calculated attorney's fee under 42 U.S.C. § 1988 and whether or not paralegal and law clerk time should be part of an award under the Civil Rights Attorney's Fee Award Act are important questions of Federal law which have not been, but should be, settled by this Court. S.Ct. Rule 17.1(c) The *Blanchard* decision may, in fact, conflict with applicable decisions of the Supreme Court of the United States. Id. The *Blanchard*

decision is confusing and should be corrected on the issues of responsibility for fee payment and on the question of "windfall."

For these reasons, this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED:



WILLIAM W. ROSEN,
ATTORNEY AT LAW
820 O'Keefe Avenue
New Orleans, Louisiana 70113
Telephone (504) 581-4892

ATTORNEY FOR PETITIONER
ARTHUR J. BLANCHARD

Referral Counsel:
CHARLES J. PISANO
Attorney at Law
7100 Hanover Road
New Orleans, Louisiana 70127

APPENDICIES

APPENDIX

PAGE

APPENDIX 1

ARTHUR J. BLANCHARD,
Plaintiff-Appellant,

v.

James BERGERON, Sheriff Charles Fuselier, ABC Insurance Company, DEF Insurance Company, Barry Breaux, Ouydrey Gros, Jr., Darrell Revere, Oudrey's Odyssey Lounge, GHI Insurance Company,
Defendants-Appellees.

No. 86-4832.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1987.

Appeal was taken from judgment of the United States District Court for the Western District of Louisiana, Donald E. Walter, J., awarding attorney fees in civil rights action. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) successful civil rights plaintiff, who had entered into contingency agreement, was not entitled to recover total attorney fees of slightly over $40,000, and (2) expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award.

Affirmed as modified.

1. **Civil Rights KEY 13.17(6)**

Amount successful civil rights plaintiff is obligated to pay his attorney serves as cap on amount of attorney fees to be awarded, although court is not bound to enforce contract for unreasonably high fee.

2. **Civil Rights KEY 13.17(6)**

Successful civil rights plaintiff, who had entered into contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded–in this case, $4,000–was limited to a fee award of $4,000, and could not be awarded $7,500 in attorneys fees.

3. **Civil Rights KEY 13.17(8)**

Expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award in civil rights case, where fee itself was limited by parties' agreement with no provisions for expenses, and items claimed represented customary out-of-pocket charges and were not unreasonable in amount.

William W. Rosen, New Orleans, La., for plaintiff-appellant.

Edmond L. Guidry, III, Martinville, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA, and JONES, Circuit Judges:

EDITH H. JONES, Circuit Judge:

This appeal deals only with the district court's attorney fee award under the Civil Rights Act after the jury awarded appellant $5,000 compensatory and $5,000 punitive damages on his § 1983 claim. Although appellant sought total attorney fees and costs slightly over $40,000, the district court awarded $7,500 in attorney fees and $886.92 for costs and expenses. We reverse, because there is a controlling contingency fee agreement between the attorney and client.

The Supreme Court has instructed that the district court has discretion in determining the amount of a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). We will only overrule findings of fact which we find to be clearly erroneous, and the reasonableness of the total award will be judged according to the abuse of discretion standard. *Curtin v. Bill Hanna Ford, Inc.*, 822 F.2d 549 (5th Cir.1987).

FEES

The district court found that Appellant had a contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded–in this case, $4,000. While the record is not without doubt on this point, this factual finding is not clearly erroneous and is supported by deposition testimony of appellant's trial counsel. The district court applied this factual finding as one justification among several for adjusting the requested lodestar downward.

[1, 2] Appellant contends that a contingency fee agreement should be disregarded in determining a reasonable fee

in civil rights cases. Several circuits have so held. *Hammer v. Rios*, 769 F.2d 1404, 1408 (9th Cir.1985); *Cooper v. Singer*, 719 F.2d 1496, 1500 (10th Cir.1983); *Lenard v. Argento*, 699 F.2d 874, 900 (7th Cir.1983); *Sargeant v. Sharp*, 579 F.2d 645, 649 (1st Cir.1978). According to appellant, we should therefore ignore his contingency agreement and, overruling other aspects of the district court decision, award him a significantly higher amount. Appellant failed to cite our circuit's holding, by which we are bound that the amount a successful civil rights plaintiff is obligated to pay his attorney serves as a cap on the amount of attorney's fee to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir.1974). The reason enunciated for this limit is that an appellant will not be given a windfall via § 1988. "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay. . . ." *Id.* The Eleventh Circuit has also followed *Johnson*, reasoning that the contract between a plaintiff and his attorney represents their notion of a reasonable fee. *Pharr v. Housing Authority*, 704 F.2d 1216, 1218 (11th Cir. 1983). In reaching this conclusion, we disserve neither the appellant nor Congress's intention to foster enforcement of the Civil Rights Acts by means of fee-shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may decide not to accept another civil rights case on a contingent-fee contract, but the outcome of this case should not be a disincentive to handling civil rights cases upon different contractual terms. See, e.g., the contract in *Pharr*, supra. Finally, to the extent that fee awards in civil rights cases are intended to reflect fees charged "in the marketplace" for legal services, enforcement of the contingent fee contract here is appropriate.

Because the fee award must be limited to $4,000, we need not address Appellant's claims that the district court improperly reduced the number of hours in the lodestar calculation. Moreover, any hours "billed" by law clerks or paralegals would also naturally be included within the contingency fee.

EXPENSES

[3] Appellant argues that the district court erred in not awarding expenses for items incident to the attorney services such as photocopying, long distance telephone calls and travel. The district court held that such expenses represent overhead which is compensated for by the attorney fee, rendering additional compensation unwarranted. Where, however, the fee itself has been limited by the parties' agreement with no provision for expenses, Section 1988 may be employed to permit such an award. The items claimed by appellant represent customary out-of-pocket charges in this type of litigation and are not unreasonable in amount. To these, we must add the costs of depositions, which the district court denied, but which fall within Fed.R.Civ.Proc. 54(d). *See Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir.1982).

Thus, the judgment of the district court is modified to provide attorney fees of $4,000 and expenses of $4,499.52.

AFFIRMED AS MODIFIED.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

JUDGMENT ON ATTTORNEY'S FEES AND COSTS

Pursuant to the foregoing Ruling,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff shall recover the reasonable attorney's fee of $7,500.00; and

IT IS FURTHER ORDER, ADJUDGED and DECREED that plaintiff shall recover as reasonable costs and expenses the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana, this 23rd day of October, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL.

RULING

Following trial of this action brought pursuant to 42 U.S.C. § 1983, plaintiff was awarded compensatory and punitive damages totaling $10,000.[1] Now, plaintiff has

1. Of the total judgment, defendants, James Bergeron and Charles Fuselier in his official capacity as Sheriff and Oudrey's Odyssey Lounge were liable in solido for compensatory damages totaling $5,000, 90 percent and 10 percent respectively. Plaintiff's § 1983 claim was dismissed against Fuseliar, thus resulting in judgement under § 1983 only against Bergeron. In keeping with this determination, the punitive damage award of $5,000 is only against Bergeron.

moved for an award of attorney's fees, costs and expenses in accord with the judgment entered June 3, 1986. The prevailing litigant in a civil rights action ordinarily is entitled to recover attorney's fees. *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981). Pursuant to 42 U.S.C. § 1988, which provides in pertinent part,

> "[i]n any action or proceeding to enforce a provision of section [] . . . 1983 [of Title 42], . . . the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs,"

this award is left to the sound discretion of the trial court. *Id*. Here, plaintiff is a prevailing party within the meaning of this part.[2] The Court must now go about the task of determining the amount of the award.[3]

The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances.

2. § 1988, by its terms, permits an award of attorney's fees only to a "prevailing party." *Taylor*, 640 F.2d at 669. In determining prevailing party status, the focus is "not on the form of the final judgment but on the substance of the relief." *Tasby v. Wright*, 550 F.Supp. 262, 271 (N.D. Tx. 1982).

3. This circuit employs the "lodestar" method of determining such amount. *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983). The Court must articulate the basis for its award of attorney's fees, thus insuring meaningful appellate review of its discretion. *Harkless v. Sweeny Independent School District*, 608 F.2d 594, 596 (5th Cir. 1979). A meaningless exercise in parroting *Johnson's* criteria is not required *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974); instead, this analysis is to assure that the Court has arrived at a just compensation based on appropriate standards. *Tasby*, 550 F.Supp. at 275.

Hensley v. Eckerhart, 103 S.Ct. 1933, 1937 (1983). As noted by the Supreme Court in *Riverside v. Rivera*, slip op. no. 85-224 (June 27, 1986), the congressional intent for enacting this provision was to allow plaintiffs to enforce civil rights laws, especially under the adverse circumstances of an unpopular cause or where the amount of damages at stake would not otherwise make it feasible for them to do so.[4] *Id.* at 15. The expressed purposes of this provision are met in the present matter; nevertheless, §1983 was not intended to be a windfall for attorneys, for it is only "reasonable" fees that are recoverable.

A fee applicant must exercise "billing judgment" with respect to the number of hours for which he seeks compensation to ensure reasonableness.[5] *Rivera*, slip op. at 7 n. 4. "Billing judgment" excludes from a fee request "excessive, redundant, or otherwise unnecessary" hours. *Id.* Moreover, the applicant bears the burden of presenting an adequate accounting of his time to allow the court to make this

4. Quoting the Senate Reports, the Supreme Court noted, "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the National's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *See* S.Rep. No. 94-1011, p. 2 (1976) (hereafter Senate Report). *Rivera*, slip op. at 15.

5. "*Hensley* requires a fee applicant to exercise 'billing judgment' not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be reasonable. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." *Id.* at 424.

determination, failing such, the claim for fees shall be denied.[6] *Hensley*, 103 S.Ct. at 1941 and n. 12. In this matter, plaintiff's records are often inadequate and difficult to decipher. Many of his time sheets fail to inform the Court of how the time billed was spent; these vague claims are, therefore, Denied. However, the Court can evaluate some of the billed hours, for which recovery will be allowed.

Recognizing that prevailing parties in civil rights actions should ordinarily recover attorney's fees under § 1988 unless special circumstances would render such an award unjust, defendant contends the case at bar is one entailing such special circumstances. Defendant argues that plaintiff did not exercise "billing judgment" in submitting his fee request and, thus, should be denied recovery. The Court agrees that billing judgment was abused in this matter, where plaintiff claimed $42,291.92 in fees. Plaintiff did not limit his request to striking redundant or unnecessary hours.

6. The applicant must submit a full and accurate accounting of his time; the accounting must be based on contemporaneous records; and the accounting must give specifics such as the dates and nature of the work performed. *Hensley*, 103 S.Ct. at 1938, 1940. The record should be sufficiently detailed to enable the Court to determine what time was spent on different claims; it must also be detailed enough to enable the Court to determine if plaintiff's attorney is claiming compensation for hours that are redundant, excessive, or otherwise unnecessary. and to determine if the attorney has exercised "billing judgment" in submitting the fee application. *Id.* at 1938-41. Counsel should at least identify the general subject matter of his time expenditures, which plaintiff has repeatedly failed to do. *See Nadeau v. Helgemore*, 581 F.2d 275, 279 (1st Cir. 1978), "('As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a porper basis for determining how much time was spent on particular claims')."

For this simple § 1983 action, plaintiff has submitted a request for an award of attorney's fees that represents in excess of 385 hours–for counsel, two co-counsel, paralegals and law clerks. This application is unreasonable, but it does not fit within one of the recognized exceptions barring recovery.[7] However, the Court will consider this abuse of "billing judgment" in adjusting the award after the "lodestar" is calculated.

The Supreme Court in *Hensley*, 103 S.Ct. 1933, announced certain guidelines for calculating a reasonable attorney's fee. *Hensley* stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate." *Id*. at 1939. This figure, commonly referred to as the "lodestar," is the starting point in calculating a reasonable fee as contemplated by § 1988. *Rivera*, at 5. In reaching this "lodestar," the Supreme Court cautioned that "[t]he district court ... should exclude from this initial fee calculation hours that were not reasonably expended" on the litigation. *Hensley*, 103 S.Ct. at 1939-40.

7. The Fifth Circuit has recognized such special circumstances as would render an award under § 1988 unjust. *Taylor*, 640 F.2d at 668. Nevertheless, § 1988 requires a strong showing of special circumstances to justify denying an award of attorney's fees and costs to the prevailing party in a § 1983 claim. *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980). Arising only in unusual situations, special circumstances sufficient to deny an award of attorney's fees include a plaintiff's § 1983 claim which was essentially a tort claim for private monetary damages and an action where plaintiff's complaint was not instrumental in remedying a civil rights violation. *Id*. at 544-45. Also, the district court in *Clay v. Harris*, 583 F.Supp. 1314 (N.D. Ind. 1984), recognized another special circumstance for denying relief under § 1988 where a plaintiff prevailed but an award of attorney's fees would encourage numerous trivial lawsuits. Despite these exceptions, the jury clearly held that plaintiff's claim fell under the Constitution and § 1983. The Court holds the above special circumstances are not applicable to the case at bar.

In addition to those hours already excluded as unidentifiable, the Court also excludes hours billed in relation to a pendent state claim. Time spent researching issues concerning this claim which are distinguishable from his § 1983 are not recoverable.[8] Hours devoted specifically to this claim did not aid the outcome of the § 1983 action and are not reasonable within the meaning of § 1988.

To further aid the Court in making this assessment, the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), identifies twelve (12) factors to be considered in calculating a reasonable attorney's fee.[9] Here, neither the facts of this case nor the issues of law were novel or complex. Plaintiff's counsel rendered satisfactory service, but this was not a case of "exceptionable success." the case was filed in 1983, came to trial in 1986, and required less than three (3) days of trial. Motion practice in the course of the litigation was minimal. Preclusion of other employment should have been non-existent; time limitations were not a problem in this litigation. Of the hours claimed by plaintiff, the Court, after the above exclusions, will allow

8. Claims for time spent researching Louisiana damages and pendent jurisdiction did not aid the prosecution of plaintiff's § 1983 claim.

9. While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in *Johnson*, *supra*. *Rivera* at 5. *See* Senate Report, p. 6; H.R. Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). "These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717-719."

recovery for only 97 hours and 20 minutes–96 hours by Mr. Rosen and 1 hour and 20 minutes by co-counsel, Ms. Dombourian.

Calculation of the "lodestar" also involves the determination of a reasonable hourly rate. Plaintiff claims an hourly rate ranging from $100 through $150 per hour depending on senority–$150/hr. for 96 hours and $125/hr. for 1 hour and 20 minutes. Defendant argues these rates are unreasonable, suggesting a rate between $65 and $100 per hour. Taking notice of the customary fees in the community, the Court agrees that plaintiff's rates are high and holds that $100/hour is a reasonable rate.

After determining the "lodestar," which is presumed to be the reasonable fee contemplated by § 1988, *Rivera*, at 5, the *Hensley* court suggested other considerations that might lead the district court to adjust the lodestar figure upward or downward. *Id*. at 1939-40. Here, as noted earlier, plaintiff's abuse of "billing judgment" requires that the lodestar figure be adjusted downward. Further supporting this reduction is the elemental nature of this litigation and the contingency fee arrangement entered in this matter.[10] The lodestar of $9,720 is adjusted downward to $7,500.00.

There is also the question of costs which has yet to be determined. Plaintiff contends it is entitled to recover as costs photocopying expenses, travel expenses, mailing expenses, expert witness fees, deposition costs, paralegal and law clerk expenses. Defendant opposes this argument, suggesting only those costs specifically enumerated in 28 U.S.C. § 1920 or other statutes are recoverable. The Court agrees with defendants.

10. The contingency fee arrangement provided for 40 percent of whatever is collected–$4,000. Plaintiff's counsel will not be given a windfall via § 1988.

Following the recent Fifth Circuit opinion of *IWA v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), § 1988 provides only for the recovery of attorney's fees by the prevailing party but does not include other expenses and cost of the litigation. *Id*. Even though the specific holding of *IWA*, *supra*, only concerned expert witness fees, the Court suggests a much more sweeping effect. *Id*. Noting the broad expanse of *IWA*, *supra*, this Court holds only those items recoverable as costs under § 1920[11] or other specific statutes are reasonable. Other costs are not recoverable.[12]

In light of the strong dissent by Judge Rubin in *IWA*, 790 F.2d at 1181, the Court also concludes the recovery of costs other than the ordinary witness fees and docket fees would be unreasonable under § 1988 and *Johnson*, *supra*. As to photocopying expenses, counsel have already been paid for preparing the memorandum or for researching the case that is being duplicated or the deposition copied. Similarly, travel costs, mailing costs and long-distance expenses amount to the recovery of the type of expenses usually associated with the

11. § 1920 provides, "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

12. Necessarily included within this exclusion are expenses for paralegals, secretairies and other support personnel.

practice of law and covered overhead expenses. Noting the simplicity of this matter, paralegal and law clerk fees were not necessitated so as to be reasonable. Whether excluded under *IWA*, *supra*, or by a reasonableness determination, items for costs and expenses are limited to those specifically enumerated. Of the $5,511.92 claimed by plaintiff, counsel may recover costs and expenses in the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana this 23d day of October, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE 10-23-86
BY d d
TO: Rosen
Guidry III
Gibbins
(stamp)

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
MAY 30 1986
ROBERT H. SHEMWELL, CLERK
BY d d
DEPUTY
(stamp)

JUDGMENT

After trial before the Court and a jury, commencing on May 20, 1986, and concluding on May 22, 1986, Honorable Donald E. Walter, District Judge, presiding, and the Court having instructed the jury to find a general verdict and to answer special interrogatories, and the jury having rendered a verdict and answered these interrogatories, which have been filed in the record;

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff, Arthur Blanchard, recover compensatory damages from defendants, James Bergeron and Charles Fuselier in his official capacity as Sheriff of St. Martin Parish liable for ninety percent (90%), and Oudrey's Odyssey Lounge liable for ten percent (10%), in the amount of Five Thousand and No/100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date this action was filed;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff recover punitive damages from defendant, James Bergeron, in the amount of Five Thousand and No /100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date judgment is entered;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's 42 U.S.C. § 1983 claim against defendant Charles Fuselier is Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's state law claims against defendants, Oudrey Gros, Jr., and Darrell Revere, are Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendant, James Bergeron, reasonable attorney fees to be later fixed by the Court; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendants, James Bergeron and Charles Fuselier in his official capacity, and Oudrey's Odyssey Lounge, reasonable costs to be later fixed by the Court.

JUDGMENT READ and SIGNED in Monroe, Louisiana, this 30th day of May, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered 6-3-86
By L J Sprott
Copy To _____
_____
_____
(stamp)

APPENDIX 4

42 U.S.C. § 1988.

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (As amended October 21, 1980, P.L. 96-481, Title II, § 205(c), 94 Stat. 2330.)